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IN THE

Supreme Court of the United States

October Term 1940

No. 444.

In the Matter of
CONSOLIDATED ROCK PRODUCTS CO., a Delaware corporation,
Debtor,

UNION ROCK COMPANY, a corporation,
Subsidiary,

and

CONSUMERS ROCK & GRAVEL COMPANY, INC., a corporation,
Subsidiary.

F. B. BADGLEY, COLONEL R. E. FRITH, T. FENTON KNIGHT, and WALTER S. TAYLOR, composing the Union Rock Company Bondholders' Protective Committee; and WM. D. COURTRIGHT, FRED L. DREHER, F. J. GAY and GUY WITTER, composing the Consumers Rock & Gravel Company, Inc. Bondholders' Protective Committee,
Petitioners,

vs.

E. BLOIS DU BOIS,
Respondent.

Respondent's Reply on Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

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reversing the judgment of the trial court confirming a proposed plan of reorganization under Section 77B of the Bankruptcy Act.

The judgment, as amended by order entered August 5, 1940 [R. 382-383], has not yet appeared in the official reports.

Jurisdiction.

The jurisdiction of this Court is invoked by petitioners under Section 240(a) of the Judicial Code (28 U. S. C. A. 347(a)) and Section 24 of the Bankruptcy Act (11 U. S. C. A. 47).

Statute Involved.

The statute involved is Section 77B(f) of the Bankruptcy Act (11 U. S. C. A. 207f), the pertinent portion of which is as follows:

> "After hearing such objections as may be made to the plan the judge shall confirm the plan if satisfied that (1) it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible * * *."

Question Presented by Petition.

Petitioners complain that the decision of the Circuit Court of Appeals is erroneous in

> "adjudging that even though the mortgaged properties of two corporations have been commingled and operated for years as a unit, a plan of reorganization is unfair if it provides for one issue of bonds, issued

in such amounts to the bondholders of the respective corporations as would give them security equivalent to the security they would have had if the plan had provided for two issues of bonds each secured by the properties of each respective company."

Discussion.

The petitioners do not attack the correctness of the decision of the Circuit Court of Appeals in so far as that Court found the proposed plan of reorganization to be in conflict with the "full priority" rule of *Case v. Los Angeles Lumber Products Co.,* 308 U. S. 106, and the earlier equity reorganization cases of this Court. They complain only that the decision prevents, in any case, the elimination of separate and distinct bond issues, each having its separate security, and the substitution therefor of a common issue of bonds with common security. The portion of the decision complained of follows, italics being used by respondent to indicate the specific language to which objection is taken by the petitioners:

> "It is obvious that the plan here is condemned by these rules. The trial court found that the property of Union covered by the trust indenture was insufficient to pay the principal and accrued interest of the bonds issued by Union, yet the Union bondholders are deprived of their right to full priority against Union's assets, since *Consumers' bondholders and* debtor's preferred stockholders are given an interest in Union's property. Likewise, the trial court found that the property of Consumers covered

by the trust indenture was insufficient to pay the principal and accrued interest of the bonds issued by Consumers, yet Consumers' bondholders are deprived of their right to full priority against Consumers' assets, since *Union bondholders and* debtor's preferred stockholders are given an interest in Consumers' property. Exactly in point, as to facts, is Case v. Los Angeles Lumber Co., *supra.* Since the order must be reversed on the ground that the bondholders have not been accorded full priority, it is unnecessary to discuss other charges of unfairness in the plan, some of which appear to be sound." [R. 377.]

The same point has been raised in Docket No. 400 by the petition of Consolidated Rock Products Co., a corporation, and Edward E. Hatch and Louis Van Gelder, constituting the preferred stockholders' committee of said corporation, also appellees below. Those petitioners, however, have attacked the decision below on various additional grounds.

As stated by respondent in his brief in answer to the petition involved in Docket No. 400, respondent does not believe that the decision below, properly construed, decides as a matter of law that separate bond issues, each having separate security, cannot be replaced in a Section 77B reorganization by a common issue of bonds with common security. However, if this Court is of the opinion that respondent is incorrect in this construction of the decision, respondent has no objection to such correction of the

decision as may be necessary to eliminate any question on the point.

Respondent did not attack the proposed plan of reorganization because of the fact that the separate bond issues of Union Rock Company and Consumers Rock & Gravel Company, Inc., each having its separate and distinct security, were replaced under the plan by a common issue of bonds secured by common indenture upon the properties of both companies. He did attack the proposed division of income as between the proposed new Series U and Series C bonds as inequitable and unfair to the present holders of bonds of Union Rock Company.

Respondent has felt that the italicized words in the portion of the decision quoted above were unnecessary to the decision and not responsive to any attack which had been made on the plan of reorganization. He joined with the appellees below in a petition asking that the decision be modified by striking out those words. The petition for modification was denied, from which it may be concluded that the Circuit Court of Appeals was of the opinion that the parties to the litigation were not properly construing the decision.

It will be noted that the Circuit Court of Appeals held the plan to be unfair simply for the reason that it failed to accord to bondholders of the corporations involved full priority as to the assets of these corporations. That the plan of reorganization is unfair is the only point of law actually decided. The decision only emphasizes the violation of the full priority rule by pointing out that

stockholders of Consolidated Rock Products Co. are permitted to share in the insufficient assets of the insolvent subsidiary corporations, and bondholders of each subsidiary share in the assets of the other. That this cross-participation by the bondholders is unfair as a matter of law is not declared by the Court, and respondent feels that the language used is merely to illustrate and emphasize the clear violation of the "full priority" rule.

Respondent files this reply merely in order that his position with respect to the limited attack made by the petitioning bondholders' protective committees will be clear.

Respectfully submitted,

KENNETH E. GRANT,
Attorney for Respondent.

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